UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0636

September Term, 2015

IN RE: JOSIAH M.

Woodward,
Friedman,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: May 19, 2016

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Appellant was charged as a juvenile in the Circuit Court for Charles County with one count of theft under $1,000 for his alleged role in the theft of several liquor bottles from a store in Waldorf, Maryland. On March 17, 2015, after a hearing, appellant was found to be involved as charged in the juvenile petition. On April 17, 2015, appellant was placed on indefinite probation.

On appeal, appellant presents the following questions for our review:

1. On the charge of theft from a store, did the trial judge err in allowing the State's witnesses to identify Appellant based on their having watched the store's surveillance video where the State made no effort to obtain or authenticate the video?

    a. Did the witnesses' testimony violate the "Best Evidence Rule?"

    b. Did the court err in allowing the witnesses to testify as to the content of the tape in the absence of any effort to authenticate the recording?

2. Did the trial judge err in holding that the rules of discovery did not require the State to provide the videotape to the defense in light of the State's assertion that it intended to establish the content of the tape through the testimony of witnesses who saw the tape, instead of offering the tape itself?

3. Did the trial judge err in permitting the State to adduce evidence which was not shown to bear any connection to the charge at issue?

4. Was the evidence insufficient to support the court's determination that Appellant was involved in the offense charged?

We answer questions 1. a. and 4 in the affirmative, and thus reverse the judgment of the juvenile court. We do not reach appellant's remaining questions.

FACTUAL BACKGROUND

On November 4, 2014, Young Ok Lee was working in her convenience store, Country Market, in Waldorf, Maryland when a group of five young males entered the store. Lee testified that they were all about the same age, between 19 and 20 years of age, the same, height, and size, and had similar color and type of hair. According to Lee, as three of the group walked around the store, one of the youths approached the counter and purchased a pack of cigarettes, for which he provided identification from Texas. The other youth was standing by the ice cream machine. Lee explained that from where she was standing, store shelving prevented her from seeing what the other three individuals were doing at this time. Shortly thereafter, the youths left the store and approached a car which Lee believed bore a Texas license plate. After they left, Lee accessed the surveillance video equipment installed in the store and saw that the three youths who had been walking around the store took some bottles of alcohol.

After watching the surveillance video, Lee called the police and reported the theft. Although Lee initially identified appellant from the witness stand as one of the three youths she saw in the surveillance video, she subsequently acknowledged that she could not distinguish him from any of the five individuals in the video. When the trial court specifically

asked her: "Well did you actually see this young man [appellant] take, on the video, take alcohol?" Lee responded "I don't know."

Officer Kenneth Barry, of the Charles County Sheriff's Office, responded to Lee's report of a theft and after speaking with Lee and her husband, Officer Barry reviewed the surveillance video. Based on this viewing of the surveillance video, Officer Barry identified appellant as one of the three youths walking around the store and as one of the two boys who grabbed the bottles of alcohol. When asked what appellant did with the items, Officer Barry responded, "I didn't ... I couldn't see, the way the camera was situated." Officer Barry continued that he did not recall seeing either a date or time stamp on the video recording. When asked, "[S]o you can't say determinatively if ... the events that you were watching on the TV happened on November 4th, is that right?," Officer Barry responded, "That's fair to say." Officer Barry never obtained a copy of the surveillance video.

Sergeant Matthew Thompson, also of the Charles County Sheriff's Office, testified that he briefly responded to the Country Market on the day of the theft, and then proceeded to a residential subdivision looking for a silver car with Texas license plates. When Sergeant Thompson saw a car meeting that description in front of a residence, he knocked on the front door of the home. He testified that he could hear people inside the house and within a short time a juvenile came to the door and let him in. Sergeant Thompson testified that once inside

the house he located appellant "crawled up in a drier [sic] in the laundry room of the residence" and that next to the dryer was a bottle of alcohol.

Maxine Rydzynski, who lived with her husband and family at the home where the silver car was found, testified that on November 4, 2014, she was at work when the police called to inform her that the incident at the Country Market convenience store involved her son. She immediately went home, and when she got there she found appellant "hiding in [her] clothes drier [sic]" with the door closed. She also explained that she found a bottle of alcohol under a pile of clothes in front of the dryer. Rydzynski testified that later that night she watched a home surveillance recording that revealed the presence of a number of youths "running around" her house, including appellant, who she knew to be a friend of her son.

Additional facts will be included as needed in the discussion below.

DISCUSSION

Appellant contends that, according to the "Best Evidence Rule" found in Md. Rule 5-1002, Lee's and Officer Barry's narratives of what occurred on the surveillance video were inadmissible secondary evidence of what the video showed. According to appellant, the evidence was inadmissible because the "best evidence" i.e., the surveillance video itself, was not available at trial and the State, as the proponent of the evidence, had no "explanation, excuse or justification for the absent video, and [] made no proffer as to any efforts made to

obtain [the video]" as required by Md. Rule 5-1004 when a party seeks to prove the contents of a video with evidence other than the original.

The State claims that the court did not abuse its discretion in finding that the surveillance video was unavailable and that the evidence was therefore properly admitted.

Appellant argued both pre-trial and during trial that the testimony about what the missing surveillance video allegedly showed was inadmissible. Prior to trial defense counsel moved to have a pre-trial identification hearing. The following colloquy ensued:

[DEFENSE COUNSEL #1]:	Based on the discovery, my understanding is that there was a surveillance video, there was one witness at the scene. That witness did not identify [appellant] at any point out of court. And so the only identification that could possibly happen is an in-court identification which would be unduly suggestive because he would be the only juvenile sitting in this courtroom, and sitting at the defense table.
THE COURT:	Yeah, I understand, I . . . know the mechanics of these things are always a little tricky, but if . . . what we'll do is, we'll have . . . who is the first witness that you were concerned about for this?
[DEFENSE COUNSEL #1]:	Your Honor, I believe the . . . the State has only provided us with

two witnesses. It's Ms. Lee and Ms. Rydznski. I believe that Ms. Lee was the only actual person in the store at the time of the alleged theft.

THE COURT: Alright, for your identification motion, we'll permit you, I guess, to call Ms. Lee and inquire of her these questions you have concerning [appellant's] identification.

During the pre-trial hearing, the State called Lee to the witness stand. When asked whether she had an opportunity to watch the surveillance video, defense counsel objected and the following ensued:

[DEFENSE COUNSEL #1]: Your Honor, that video was not provided to Defense counsel at any point. I ask that pursuant to Rule 11-109, it was supposed to be provided to Respondent's counsel, and was not provided. In addition, I ask that Your Honor exclude any testimony about what was seen in that video, pursuant to the best evidence rule, as the video can speak for itself.

* * *

THE COURT: Okay, the objection is overruled. I believe that the State could not, if they didn't provide the videotape, use it at the hearing,

but I don't believe that asking the witness, "Did you look at this videotape," is a violation of the Rule. So that objection is overruled.

The State continued its questioning of Lee and asked "How many people did you see take alcohol?" Defense counsel objected and the following ensued:

[DEFENSE COUNSEL #1] Your Honor, I object once again. In Washington v. State, the Court of Appeals addressed the issue of surveillance videos and how they can be used at trial. And in Washington, what the Court said is that "There must be testimony as to the process used, the manner of the operation of the cameras, the reliability or authenticity of the images, and the chain of custody of the pictures."

Also in Washington, the Court said that you need . . . the Court needs the technician who downloaded whatever footage and transferred it, in order to have testimony as to surveillance footage.

* * *

THE COURT: [Defense counsel], it looks to me like this talks about the admissibility of a videotape.

[DEFENSE COUNSEL#1]: Yes, Your Honor, and in State v. Cabral, I don't have the case with me, but the citation is 159 [Md. App.] 354, and it's a case from 2004. The Court spoke there about the best evidence rule as it relates to surveillance videos, and there, the Court said that the best evidence rule does apply to recordings. And it's the State's burden of proof to show that the reason why the recording is not available is because of an inadvertent mistake, such as, in State v. Cabral, the copy was inadvertently destroyed after Defense counsel was already provided with a copy.

* * *

THE COURT: I understand, I understand. The basis of the objection, based on Washington v. State, is overruled.

* * *

THE COURT: Okay, the Court's got Judge Murphy's Maryland Evidence Handbook . . . . "The rule requires that when the contents of a writing are at issue, the original writing must be produced, or its absence satisfactorily explained before secondary evidence may be introduced. This rule really can be called the original document rule. The best evidence as we

apply it here is a rule of exclusion, not a permitted inference. If the contents of a writing," or I [sic] thing a tape, "are at issue, unless the original is produced, or unless the absence is satisfactorily explained, the trial court must exclude any other evidence of content." Alright, [State's Attorney].

[THE STATE]: Thank you, Your Honor.

THE COURT: **Why do we not have the tape, itself?**

THE STATE: **I'm not sure. I mean, I have a duty of candor to Your Honor, so I will tell you first, I'm not sure. Often in these cases, the videos aren't preserved.**

* * *

THE COURT: **[L]et me ask you this, [the State]? You've never seen this videotape?**

THE STATE: **That's correct, Your Honor.**

THE COURT: **Okay, and you don't even know if it exists?**

THE STATE: **That's right. I presume it doesn't, but I don't know.**

(Emphasis added).

After hearing the pre-trial arguments of counsel about the admissibility of the testimony concerning the missing surveillance video, the trial court ruled that the evidence was admissible, stating:

> Alright, the objection is going to be overruled. As I read Judge Murphy's handbook, and it seems its cited in the case that counsel submitted to me, "Carelessness, recklessness, ordinary negligence, even gross negligence are all satisfactory explanations. Intentional destruction to gain an unfair advantage is obviously not a sufficient excuse. What I have heard here is, **the State may not have actually prepared the case well enough,** no offense. There's thousands of cases out there, **and they just didn't do it. That could be negligence** ... some people might say it's negligence. Some people might say it just can't get done, but at any rate, **I don't believe its the exclusionary rule is appropriate,** so the motion … the objection is overruled.

(Emphasis added).

During the testimony of Officer Barry at trial, the State asked "Okay, what did you see on the surveillance footage?" Defense counsel #2, objected with the following:

> So the evidentiary problem that we have with the video coming in is the following: what the Court has allowed, in essence, is for the witnesses to testify about what is on the video. So the Court is, in essence, admitting the video, without the video being provided to counsel, being provided into evidence.
>
> And so what we have is so many different layers of problems, evidentiarily. To start with, the authentication prongs of Washington have not been met. So just because the video is absent from evidence does not except the State's requirements to satisfy those two prongs of, number one, authentication of the video equipment at the scene, at the store, that the video equipment was working functionally, that date

> and time stamp were working functionally, that the video is recording what it purports to be recording.
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> * * *
>
> So that's the problem. This case is only based on witnesses looking at a video that we don't have, we never will, neither will the Court. So the problem is a grave one, and we would ask that the Court strike any testimony that is based on the witnesses viewing of the video that has, again, not been provided to us.

In response, the State offered the following insight:

> **[The surveillance video] it's not a video I have seen.** I mean, I could just put as a proffer of fact that, you know, generally the only videos that come into our office without me knowing about them are iPop videos, which is not the video that we are talking about here. **I would presume if this video showed up in our office, somebody would have handed it to me. But again, I can't say that if you look through every single file downstairs that it isn't there. I can just say, I have never seen it, and nobody ever told me that it exists.**

(Emphasis added).

The trial court again overruled the defense objection, ruling that the issue was one of the weight of the evidence, not its admissibility. The court said:

> The objection is overruled. To me . . . the **missing video**, and it is at this point a missing video, it **goes to the weight of what the testimony that I am hearing, not the admissibility of it.** I don't think that this situation is all that unusual. I am cognizant, and aware, and I'm hearing, that look, **this is an identification issue case. The identification is based solely on a video which we don't have. To me, that goes to the weight of these identifications, not to the admissibility.**

(Emphasis added).

Analysis

"'The Best Evidence Rule states a *preference* for original documents, but does not foreclose use of secondary evidence 'after a proper foundation has been laid showing good and sufficient reasons for the failure to produce the primary evidence.'" *Gordon v. State*, 204 Md. App. 327, 347 (2012) (emphasis in original) (quoting *Cooper v. State*, 41 Md. App. 392, 398 (1979)). The Best Evidence Rule, as set forth in Md. Rule 5-1002, states: "To prove the content of a writing, recording, or photograph, the *original* writing, recording, or photograph is required, *except* as otherwise provided in these rules or by statute." [1] (Emphasis added).

[1]A copy of the original surveillance video would have been just as admissible as the original pursuant to the "Maryland Uniform Photographic Copies of Business and Public Records as Evidence Act" found in Md. Code (1974, 2013 Repl. Vol) § 10-102 of the Courts & Judicial Proceedings Article, which provides:

> (a) *In general*. — If a business, institution, member of a profession or calling, or a department or agency of government, in the regular course of business or activity has kept or recorded a memorandum, writing, entry, print, representation, or a combination of them, of an act, transaction, occurrence, or event, and in the regular course of business has caused any or all of them to be recorded, copied, or reproduced by a photographic, photostatic, microfilm, microcard, miniature photographic, optical imaging, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. The reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in a judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of the reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under

(continued...)

Md. Rule 5-1001 defines "photograph" to include "still photographs, X-ray films, video tapes, and motion pictures." Some "exceptions" to the Best Evidence Rule are found in Rule 5-1004, which provides:

> The contents of a writing, recording, or photograph may be proved by evidence other than the original if:
>
> (a) *Original Lost or Destroyed.* All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;
>
> (b) *Original Not Obtainable*. No original can be obtained by any reasonably practicable, available judicial process or procedure;
>
> (c) *Original in Possession of Opponent*. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing or trial, and that party does not produce the original at the hearing or trial; or
>
> (d) *Collateral Matters*. The writing, recording, or photograph is not closely related to a controlling issue.

It is clear that the missing surveillance video from the store is included within the scope of the Best Evidence Rule, because Rule 5-1001 includes "video tape" and "motion pictures" within the meaning of "photograph". As a result, the content of a surveillance video is required to be proved by viewing the original video (or a copy of it) unless one of the exceptions found in Rule 5-1004 is met. Only after one of the exceptions set forth in

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[1](...continued)
direction of the court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original.

Rule 5-1004 is met, can secondary evidence be admitted to prove the contents of the missing evidence. *Sewell v. State*, 34 Md. App. 691, 694, *cert. denied*, 280 Md. 734 (1977). The proponent of the evidence carries the burden to satisfy one of those exceptions. *Wentworth v. State*, 29 Md. App. 110, 122 (1975), *cert denied*, 278 Md. 735 (1976).

In *Forrester v. State*, 224 Md. 337 (1961), the Court of Appeals affirmed a trial court's prohibition of an investigator's testimony regarding his recollection of a tape recorded conversation which had been played in his presence earlier but was not available at trial. *Id.* at 348-49. In *Forrester*, as in the present case, "no effort was made to produce the original tape, nor any explanation offered for its non-production[.]" *Id*. at 349. *Forrester* reiterated that "[t]he best evidence of which the case is capable must be produced, and secondary, or inferior, evidence is only admissible after a proper foundation has been laid, showing good and sufficient reasons for the failure to produce the primary evidence." *Id.*

In *State v. Cabral* 159 Md. App 354 (2004), this Court reversed a trial court ruling prohibiting a police officer from testifying to what occurred on a video recording of a traffic stop. *Id.* at 386. In that case, unlike the present case, the State had adequately established that the police officer had inadvertently destroyed the video in the course of attempting to make a copy of it. *Id.* at 381-82.

It is abundantly clear to us from the record in the case *sub judice* that the State never attempted to meet, much less met, the preliminary admissibility requirements of Rule 5-1004.

The State made no showing whatsoever that the original surveillance video was lost, destroyed, not obtainable, in the possession of appellant, or collateral. No one contends that the video was collateral – it was the cornerstone of the State's case. The trial court itself noted that "this is an identification issue case … [and] [t]he identification is based solely on a video which we don't have." The State never proffered that the video was "lost", "destroyed" or otherwise "not obtainable;" it only represented that it had never seen the video and did not know whether it existed. There simply was no explanation offered for why the surveillance video was not available, nor was there any suggestion that the State had made an effort to obtain a copy of it.

Although a trial court's ruling on the admissibility of secondary evidence is subject to an abuse of discretion standard, *Donati v. State*, 215 Md. App. 686, 708, *cert. denied*, 438 Md. 143 (2014), a trial court abuses its discretion by admitting testimony that is "plainly inadmissible under a specific rule or principle of law." *Merzbacher v. State*, 346 Md. 391, 405 (1997). We believe that the testimonies of Lee and Officer Barry about the contents of the surveillance video were plainly inadmissible and highly prejudicial to appellant. As a result, we reverse the judgment of the juvenile court.

Apart from such testimonies of Lee and Officer Barry, there was no evidence identifying appellant as one of the five young men in Lee's store at the time of the theft.

Therefore, there was insufficient evidence for a juvenile court to find appellant involved in the offense of theft under $1,000. Accordingly, appellant cannot be retried.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY REVERSED. COSTS TO BE PAID BY CHARLES COUNTY.